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In The

Supreme Court of the United States

October Term, 1990

DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN; AND THE BOARD OF TRUSTEES OF THE DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN,

Petitioners,

vs.

SEAWAY PORT AUTHORITY OF DULUTH,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT

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The opinion of the District Court (Petitioner's Appendix C) is not officially reported. The opinion of the Court of Appeals for the Eighth Circuit (Petitioner's Appendix A) is reported at 920 F.2d 503 (8th Cir. 1990).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether Respondent is an "employer" within the meaning of the MPPAA.

STATEMENT

The facts of the case are stated fully in the decision of the Court of Appeals (Petitioner's Appendix A, at A2-A4).

ARGUMENT

1. The Eighth Circuit's Decision Does Not Conflict With The Decisions Of This Court

Petitioner claims that the decision below is in conflict with the decisions of this Court, citing *Ingersoll-Rand Company v. Perry McClendon*, 498 U.S. ___, 111 S.Ct. 478,

482, 112 L.Ed.2d 474, 483 (1990); *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 12, 107 S.Ct. 2211, 2218, 96 L.Ed.2d 1 (1987). In particular, Petitioner contends that the Eighth Circuit's decision failed to follow this Court's lead in recognizing the pre-emption of state laws insofar as they relate to an employee benefit plan described in 29 U.S.C. Section 1003(b). *See* 29 U.S.C. Section 1144(a).

Contrary to Petitioner's argument, the Eighth Circuit's reasoning in its decision below is in complete harmony with the decisions of this Court. The Eighth Circuit was fully aware that ERISA pre-empts state law relating to an employee benefit plan. For example, in footnote 3 of the decision below, the Eighth Circuit explicitly recognized the dynamics of pre-emption, noting:

> "The circuits that have addressed the definition of employer under ERISA and MPPAA, however, have uniformly rejected the use of state common law."

Rather than resting its definitional analysis upon state law, the Eighth Circuit borrowed the well-recognized federal "contributing obligor" test first adopted by the Second Circuit in *Korea Shipping Corp. v. New York Shipping Ass'n-Int'l Longshoreman's Ass'n Pension Trust Fund*, 880 F.2d 1531, 1537 (2nd Cir. 1989), wherein the Second Court stated:

> [T]he term employer in 29 U.S.C. Section 1381(a) means 'a person who is obligated to contribute to a plan either as a direct employer or in the interest of an employer of the plan's participants.'

(See Petitioner's Appendix A at A10). Applying this test, without regard to state law of any kind, the Eighth Circuit concluded SPAD was not an employer under MPPAA:

> Our review of the record does not reveal any contracts SPAD signed explicitly obligating it to make pension contributions. (footnote omitted). Thus, applying the relevant case law, SPAD is not obligated to contribute and is not an employer under MPPAA.

(Petitioner's Appendix at A, A14-A15).

The Eighth Circuit's primary reference to state law is found in a lone short paragraph on page A15 of Petitioner's Appendix. In that paragraph, as further support for its conclusion that SPAD was not a contributing obligor, the court gave due recognition to the nature of SPAD. The court observed that SPAD, unlike any of the other employers in the case law, is a creature of state law. As a public body using public funds, SPAD operates only within a strict statutory framework. Under the Minnesota Statutes, SPAD was given the power to hire a managing agent, if it so chose, and to specify that "employees engaged by the agent are employers of the agent and not of the port authority" and that "the agent is responsible to pay the employees and to comply with * * * federal laws affecting employees."

Nowhere in the above-mentioned paragraph did the court imply that states have the power, by state legislation, to "isolate" themselves from federal laws such as ERISA and MPPAA. (See Petitioner's Brief at 9). Rather, the Eighth Circuit cited these Minnesota statutes merely to convey that although SPAD was unique compared to

the private-sector employers in case law, it had authority, like private sector employers, to hire an independent agent which, by state statute, was placed in a position free of political influence to hire, fire and make its own contracts regarding employment and benefits. Like private-sector employers, SPAD had the power to sign, or not sign, collective bargaining contracts and other documents evidencing an obligation to contribute to a plan. This power was expressly granted by state statute, which law Petitioner is presumed to know. *Albrecht v. Sell*, 260 Minn. 566, 110 N.W.2d 895, 897 (1961). By lawfully exercising its power to hire an independent agent that was free and unfettered in determining which employees to hire and which agreements to sign as a contributing obligor, SPAD is entitled to be free from any obligor liability arising out of the managing agent's contract with the ILA Plan. This is true not because the Minnesota Statutes superseded the MPPAA but because within the confines of the MPPAA, the state of Minnesota gave SPAD express legislative authority to hire independent agents who, as a result of agreements made solely by the agent, become contributing obligors, thereby protecting SPAD's limited public treasury.[1] (Without the existence of this state legislation, and the reference to it by the Eighth Circuit, Petitioner would argue that SPAD's contract with

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[1] SPAD has no general taxing authority. *See* Minn. Stat. Section 469.053, subd. 1 (1990). Moreover, SPAD may not incur an obligation or expense unless existing appropriations together with reasonably expected SPAD revenue from other sources are sufficient to discharge the obligation or expense when due. Minn. Stat. Sec. 469.056, subd. 2 (1990).

North Central was outside its statutory authority, therefore ultra vires, with SPAD liability presumed on an ultra vires contract).

SPAD's unique status is also relevant in that, as a governmental non-profit body, SPAD had no incentive to hire a managing agent for an improper purpose. Petitioner's fears of a "sham" arrangement and "dummy" agents are simply unfounded in a public sector context such as this. (See Petitioner's Appendix A at A16). This is especially true under the particular facts of the instant case, where SPAD's sole concern was to find a private entity to manage and assume responsibility for the port terminal. SPAD's only "crime" was that it did not want to be in the day-to-day port management business. Petitioner does not and cannot point to any "hidden" or inappropriate motives behind the SPAD/North Central managing agent contract. That Petitioner's fears of impropriety and fraud with regard to SPAD's contractual arrangements are without foundation is only reaffirmed by a recognition of SPAD's government nature.[2]

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[2] Government plans are exempt from the requirements of ERISA and the MPPAA. 29 U.S.C. 1103(b)(1). SPAD's *real* employees (office personnel, etc.) have always been participants in a government plan. Assuming, arguendo, that SPAD employed the longshoremen, SPAD could have avoided pension liability by obliging itself to make contributions to a government plan. Thus, although private sector employers might find a method to unfairly use intricate corporate structures to avoid withdrawal liability, public entities such as SPAD have no incentive to do so.

Thus, a closer examination of the Eighth Circuit's analysis reveals that the Eighth Circuit's opinion is completely consistent with the decisions of this Court. Petitioner is in error when it attempts to portray the Court of Appeal's relatively short references to state law as a separate, independent decisional basis for the court's opinion. To the contrary, the court rested its decision upon the contributing obligor test alone. Reference to the unique nature of SPAD bolstered the Eighth Circuit's conclusion that an extension of the contributing obligor test would be unwise in light of the absence of any evidence that SPAD either acted outside its authority or acted with improper motives.

Assuming, arguendo, that the court's state law analysis formed a separate and inaccurate basis for the court's decision, the court's ultimate conclusion of law (i.e. SPAD is not an employer within the meaning of MPPAA), is fully supported by the court's contributing obligor analysis, without regard to state law.

2. The Eighth Circuit's Decision Is Not Erroneous And Does Not Conflict With Other Appellate Decisions.

Petitioner acknowledges that in all of the appellate decisions where an entity has been held liable for "employer" withdrawal liability under MPPAA, the entity had a contractual obligation to make contributions to a multi-employer plan. (Petitioner's Brief at 11). *See Korea Shipping Corp.; Bowers v. Transportacion Martima Mexicana, S.A.*, 901 F.2d 258 (2nd Cir. 1990); *Philippines Micronesia & Orient Navigation Company v. NYSA – ILA*

Pension Trust Fund, 909 F.2d 39 (2nd Cir. 1990) (per curium), *Petition for cert. filed*, 59 U.S.L.2. 3295 (U.S. Oct. 3, 1990) (No. 90-576); *Carriers Container Council, Inc. v. Mobile S. & S. Ass'n, Inc – Int'l Longshoremen's Ass'n, AFL-CIO Pension Plan and Trust*, 896 F.2d 1330, 904 F.2d 28 (11th Cir. 1990) *petition for cert. denied*, 111 S.Ct. 308 (U.S. October 15th, 1990) (No. 90-323); *Laborers Local 938 v. B.R. Starnes Co.*, 827 F.2d 1454 (11th Cir. 1987) (per curium); *H.C. Elliot, Inc. v. Carpenters Pension Trust Fund*, 859 F.2d 808 (9th Cir. 1988). The Eight Circuit, after reviewing this case law, determined that since SPAD had no contractual obligation to contribute to the Plan, SPAD was not an employer within the meaning of MPPAA. This analysis by the Eighth Circuit is perfectly consonant with the decisions of the other circuits.

The so-called "contributing obligor" test adopted by the Eighth Circuit is premised upon the remedial and protective policies underlying the MPPAA. This test derives its authority from the congressional concern for the financial stability of multi-employer plans. *Korea Shipping Corp.*, 880 F.2d 1531, 1536-37. As noted by the Eleventh Circuit,

> The contributing obligor test drawn from Title I of ERISA furthers Congress' purposes in passing the MPPAA because it prevents a contributor to a plan from withdrawing its support without covering its share of unfunded liabilities.

Carriers Container Council, 896 F.2d 1330, 1343.

Rather than challenging the Eighth Circuit's adoption of the contributing obligor test, as developed by the Second, Ninth, and Eleventh Circuits, for determining

whether an entity is an employer within the meaning of MPPAA, Petitioner challenges the Eighth Circuit's *application* of the test. (Petitioner's Brief at 13.) Petitioner argues that the Appellate Court "simply erred when it concluded that there was no contractual obligation on the part of SPAD" to make contributions to a multi-employer plan. (Petitioner's Brief at 14.) Thus, Petitioner's disagreement with the Eighth Circuit is exceedingly narrow compared to the larger issue concerning the general meaning of the term "employer."

In contending that SPAD was contractually bound to make contributions to the ILA plan, Petitioner quotes Article III of the Managing Agent Agreements between SPAD and North Central, which provided as follows:

> FUNDS
>
> All funds which are required for or arise out of the operations conducted by the Agent shall be deposited in an account or accounts in depositories to be designated by SPAD. Such accounts shall be designated 'North Central Terminal Operators, Inc., Managing Agent, Public Marine Terminal Division, Seaway Port Authority of Duluth'. All such funds shall be considered the property of SPAD and not of the Agent. SPAD will provide Agent with sufficient funds in said accounts to carry on the operations.
>
> Agent will have a separate bank account to be called a payroll account into which deposits will be made from the operating account above described in order to enable Agent to meet its payroll expenses and related fringe benefits. ALL SUCH FUNDS SHALL CONTINUE TO BE THE PROPERTY OF SPAD UNTIL DISBURSED TO OR FOR THE ACCOUNT OF EMPLOYEES

FOR PAYROLL EXPENSES AND RELATED FRINGE BENEFITS.

(Emphasis added.)

Petitioner somehow interprets this language as a contractual obligation undertaken by SPAD to make contributions to a multi-employer plan. Such an interpretation is inaccurate for several reasons. First, the above-quoted language fails to even *mention* a multi-employer plan. In fact, unlike the contractual documents relied upon in the cases cited by Petitioner, nowhere in the *entire* managing agent agreement is there any reference to a multi-employer plan. *Compare Korea Shipping Corp.* (document provided that "assessment shall be collected by the direct employer from each of the carriers and shall be paid to the NYSA for immediate transmittal to the NYSA-ILA Fringe Benefits Escrow Fund . . . Pension payment shall be made by the NYSA directly to the NYSA-ILA Pension Trust Fund"); *Carriers Container Council*, 896 F.2d at 1344 (document provided that "assessment amounts shall be collected as necessary from the carriers by . . . [CCC] which shall pay out the [multi-employer pension plan] shortfall payments. . . .) With respect to the managing agent agreements, neither North Central nor SPAD made promises regarding the maintenance of a multi-employer plan. Although it is true that SPAD agreed to advance operating capital to North Central for North Central's payment of "fringe benefits" to the employees, such an agreement is in no way comparable to the pension fund obligations undertaken by the contributing obligors of previous case law, as the agreement established no duty running from SPAD to the ILA Plan that SPAD would make contributions to the Plan. Accordingly, SPAD could

not possibly incur withdrawal liability for failing to make contributions which were never promised the Plan in the first place.

Second, Petitioner misunderstands the purpose of the above-quoted language in the managing agent agreements. The monies that were deposited into the payroll account were public monies. As such, under the Minnesota Constitution, the monies had to be used for public purposes only, and not in the furtherance of any private purpose or in the aid of any private individual or entity. *See Port Authority of City of Saint Paul v. Fisher*, 132 N.W.2d 183, 192, 196 (Minn. 1964). Respondent, recognizing this constitutional limitation, reserved limited control of the funds until final disbursement to ensure that the funds would not be co-mingled with private funds but instead used by North Central for a public purpose. To suggest that this sound fiscal management somehow evidenced a contractual commitment on the part of SPAD obligating it to make contributions to the ILA plan is a distortion of the facts. SPAD never contractually obliged itself to the ILA plan.

Third, Petitioner's ill-conceived expansion of the contributing obligor contractual test leaves SPAD and similarly situated public bodies at the mercy of their private managing agents. Carrying Petitioner's position to a logical conclusion, a managing agent's *unilateral* decision to join and then withdraw from a multi-employer plan would expose the public body to unexpected and uninitiated pension liability. The public body would bear the full financial consequences of a decision in which it had no participation. This is not the result intended by the

MPPAA nor was this result contemplated by the originators of the contributing obligor test. Under the contributing obligor test adopted by the Second, Eighth, Ninth and Eleventh Circuits, the public body is not held liable for an unfunded multi-employer plan unless it expressly enters into a bargaining agreement or similar contract whereby it agrees to fund that particular plan. By contrast, in the instant case, SPAD never asked North Central to join the ILA plan or, for that matter, any plan whatsoever. North Central never sought SPAD's approval for North Central's acts relating to the Plan or the employees. SPAD had no opportunity to stop North Central from withdrawing from the ILA plan. To impose unfunded pension liability upon SPAD under these circumstances is unreasonable and unfair. Protecting the financial viability of multi-employer plans should not come at the expense of the victimization of public bodies who hire independent managing agents. This is particularly true in the instant case, where Petitioner has made no attempt to recover its loss from North Central, the only entity which had a choice as to whether or not withdrawal liability was to be incurred.

Fourth, it is important to note that before the MPPAA was enacted, SPAD at one time had contractually obligated itself to contribute to the ILA multi-employer plan. (See Respondent's Appendix A at A1). In 1979, SPAD was removed as a signatory to the Restated Trust Agreement. (See Petitioner's Appendix A at A33-A35).[3] The 1979 Restated Trust Agreement also provided that,

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[3] In Section 1.5(d) of the Restated Trust Agreement, the agreement provided that SPAD and certain other original

(Continued on following page)

> Employers, who are not signatory to this Agreement but who have persons in their employ coming within the classifications represented by the Unions signators hereto and who have collective bargaining agreements with such Unions, may become a participating employer under the terms of this Agreement and make contributions to the Trust, with the consent of the Trustees, on the signing of a Participation Agreement and/or a labor agreement, where applicable, providing for participation in the Trust containing such terms as required by the Trustees and on such basis as agreed upon by such new contributing Employers and the Trustees respecting the contributions to be made and the coverages to be afforded to the employees.

(Respondent's Appendix A at A6, Section 2.2.) It is undisputed that SPAD never signed a Participation Agreement or labor agreement providing for participation in the Trust. Thus, by its own terms, the Restated Trust Agreement disavows any SPAD responsibility for plan contributions. Had Petitioner intended to hold SPAD contractually liable for plan contributions, it never would have expressly excluded SPAD by the very language of the Restated Trust Agreement.

Finally, it is important to note that Petitioner has not cited a single appellate case which is in conflict with the Eighth Circuit's decision. Petitioner cannot dispute the fact that not a single appellate decision has imposed withdrawal liability upon an entity that has such a tenuous, if any, connection to a plan. Nor has any appellate

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(Continued from previous page)

signatories "are no longer parties to this restated Agreement and Declaration of Trust" (Respondent's Appendix A at A4).

decision imposed withdrawal liability upon a public entity. In every case cited by Petitioner, the "contributing obligor" was a private sector entity which signed a contract expressly requiring it to contribute to a particular multi-employer plan.

3. National Importance Of The Case.

Petitioner argues that the Court of Appeals's decision below unwisely permits an "employer" to "contract away" its withdrawal liability by entering into an agreement with a third party for that purpose. (See Petitioner's Brief at 15). To begin with, this argument begs the question with respect to who is an "employer." The Second, Eighth, Ninth and Eleventh Circuits have defined "employer" as an entity that obligates itself to make contributions to a multi-employer plan. Under such a definition, an employer who withdraws from a plan will be liable for such withdrawal regardless of any contracts to the contrary. In other words, it is impossible to be an "employer" and at the same time be absolved of withdrawal liability.

Second, Petitioner's use of the term "contract away" is misleading. SPAD cannot "contract away" something it never had to begin with.

Boiled to its essence, Petitioner's position is that principals should not be able to hire managing agents to serve as both common law employer and sole "contributing" employer. But as the Eighth Circuit stated succinctly,

> "There is nothing inherently improper in this, however, because parties may contract as they see fit, within certain limitations. A pension

> plan's proper recourse is to assess withdrawal liability against the managing agent."

(See Petitioner's Appendix A at A16). Petitioner has made no attempt to hold North Central liable for its withdrawal from the Plan. Instead, it leapfrogged the managing agent and sought recourse directly from SPAD, a public body with limited funds. Now Petitioner asks this Court to extend the contributing obligor test when it has not even exhausted the remedies it already has.

Petitioner seeks to distract the Court from Petitioner's ability to redress its own withdrawal liability situation by conjuring up scenarios where entities attempt to circumvent the MPPAA by the use of "intricate corporate structures." (Petitioner's Brief at 16-17). This circumvention argument is unpersuasive. For one thing, Petitioner's fears of sham, insolvent entities circumventing the MPPAA are entirely hypothetical and conjectural. Petitioner does not assert that North Central was an insolvent or undercapitalized entity, nor is there an allegation that SPAD encouraged North Central to join a multi-employer plan.[4] Petitioner merely asserts that some entity under some circumstance might employ an insolvent agent to assume pension liability, thereby undermining the financial stability of a plan. The Court is well aware that rules of law are best decided upon specific concrete facts, not abstract, hypothetical scenarios. *See Abbott Labs v. Gardner*, 387 U.S. 136, 148, 87 S.Ct. 1507, 1515, 18 L.Ed.2d 681 (1967); *Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1, 72, 81 S.Ct. 1357, 1397, 6

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[4] As observed in footnote 2 of this brief, SPAD had no incentive to circumvent ERISA or MPPAA.

L.Ed.2d 625 (1961). The Eighth Circuit, recognizing this principle, refused to be drawn into an abstract analysis. Instead, it correctly concluded that if and when there is evidence of a particular "sham" or insolvent entity assuming pension fund liability, the judicial response can be decided at that time, under the clear light on concrete, specific facts.

Also, Petitioner's fears of a sham entity circumventing the MPPAA are totally unfounded. The trustees of multi-employer pension plans are perfectly capable of protecting their plans from "sham" contributors. If the plan trustees are uncertain as to the financial viability of a potential contributor, the trustees can require financial assurances and/or refuse the entity admission to the plan. Labor organizations are also capable of monitoring the financial health of bargaining agreement signatories. This self-help is far more likely to protect the financial stability of multi-employer plans than Petitioner's scheme in which entities associated with contributing obligors are unsure whether or not they may be held liable for millions of dollars in unfunded pension obligations.

Finally, the MPPAA already has a special provision by which corporations are prohibited from utilizing intricate corporate structures in order to avoid withdrawal liability. Section 1301(b) provides that:

> For purposes of this subchapter, under regulations prescribed by the corporation, all employees of trades or businesses (whether or not incorporated) which are under common control shall be treated as employed by a single employer and all such trades and businesses as a single employer.

Treasury Regulation 11.-414(c)-1(a) provides in pertinent part:

> [T]he term "two or more trades or businesses under common control" means any group of trades or businesses which is either a "parent-subsidiary group of trades or businesses under common control" . . . , a "brother sister group of trades or businesses under common control" . . . , or a "combined group of trades or businesses under common control". . . .

Under the "controlled group" concept, a business may not "limit its responsibilities under [the MPPAA] by fractionalization of its business operations. *Pension Benefit Guaranty Corp. v. Center City Motors, Inc.*, 609 F.Supp. 409, 412 (S.D. Cal. 1984); *see also Pension Benefit Guaranty Corp. v. Ouimet*, 470 F.Supp. 945 (D. Mass 1979), *aff'd*, 630 F.2d 4 (1st Cir. 1980), *cert. denied*, 450 U.S. 914, 101 S.Ct. 1356, 67 L.Ed.2d 339 (1981). Thus, congress foresaw the problem of business fractionalization and devised a limited special remedy to prevent its occurrence. Interestingly, by contrast, congress made no attempt to forbid principals from hiring managing agents to serve as common law employer and sole "contributing" employer. One can only conclude that had congress intended to hold *all* principals, even those who have signed nothing obligating them to contribute to a multi-employer plan, responsible for the withdrawal liability of independent managing agents, congress would have adopted a framework more expansive than the "controlled group" concept.

CONCLUSION

As discussed at length above, it is both premature and unnecessary to grant the petition for certiorari with respect to the legal issues now before the Court. It is premature for three reasons. First, as noted by the Eighth Circuit, there is a paucity of case law from which the Court can gather insight with regard to the definition of "employer" as used by the MPPAA. (Petitioner's Appendix A at A10). In fact, only the Eighth Circuit has addressed the question of whether withdrawal liability may be imposed upon a public body like SPAD which had such a tenuous connection with a multi-employer plan. Second, as noted by the Eighth Circuit, the Court is not faced with a sham insolvent agent in the instant case; accordingly that issue should be left for another day. (Petitioner's Appendix A at A16). Finally, Petitioner has not cited a single appellate case which conflicts with the Eighth Circuit's decision. Prudence dictates that other circuits should be given the first opportunity to determine whether the Eighth Circuit's analysis is correct.

It is unnecessary for this Court to grant the petition for certiorari because the Eighth Circuit properly adjudicated the issues before it. The Eighth Circuit correctly recognized that SPAD never obligated itself to make contributions to a multi-employer plan. (Petitioner's Appendix A at A14). SPAD did not sign any collective bargaining agreements, shipping association agreements, or pension plan trust agreements obligating itself to contribute to the Plan. The Plan was well aware both practically and legally that by the terms of its Restated Trust Agreement and the Minnesota Statutes governing the managing agent arrangement, it could not look to SPAD

for financial support. To impose withdrawal liability on a public body such as SPAD (which made no decision, evidenced by the execution of any documents, to join the Plan, nor did it engage in contractual avoidance by encouraging its managing agent to join the Plan) is completely contrary to the spirit behind the MPPAA and the well-reasoned law of the circuit courts.

For the reasons set forth above, the petition for certiorari should be denied.

Dated: April 24, 1991

Respectfully submitted,

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APPENDIX A

RESTATED AGREEMENT AND DECLARATION OF TRUST UNDER DULUTH-SUPERIOR ILA MARINE ASSOCIATION RESTATED PENSION PLAN

THIS RESTATED TRUST AGREEMENT, made and entered into as of the 13th day of December 1979, by and between the undersigned Union Trustees and Employer Trustees, who, together with their successor Trustees designated in the manner hereafter provided, are hereinafter collectively referred to as "Trustees".

WHEREAS, an Agreement and Declaration of Trust for the purpose of providing and maintaining insured pensions for participating employees was made and entered into effective the 10th day of December 1964, between General Cargo Workers, Local No. 1366, Duluth, Minnesota, an affiliate of the International Longshoremen's Association, AFL-CIO, and General Cargo Workers, Local No. 1037, Superior, Wisconsin, an affiliate of the International Longshoremen's Association, AFL-CIO, and the International Longshoremen's Association, AFL-CIO, hereinafter called the Union, and Duluth-Superior Marine Association, American Grain Trimmers, Inc., Atlantic & Gulf Grain Stevedoring Associates, Boland & Cornelius, Cullen Stevedoring Company, Ltd., Duluth Seaway Agency, Inc., Ceres Stevedoring, Inc., Alastair Guthrie, Incorporated, The M. A. Hanna Company, S.A. McLennan, J. F. McNamara Corp., Nicholson Transit Co., Pearson Stevedoring Co., Rogers Terminal and Shipping Corporation, Sauter Stevedoring Corp., Sealanes International, Inc., Seaway Port Authority of Duluth, Svensson & Baker, Inc., and Twin Ports Ship Cleaners, Incorporated, hereinafter called the Employers, and the individual

employers who employ members of "the Unions" and who have individually entered into a collective bargaining agreement with "the Unions", hereinafter referred to collectively as "the Employer", which agreement has heretofore been amended; and

WHEREAS, said Agreement and Declaration of Trust provides that it is subject to amendment from time to time by an agreement in writing signed by the Board of Trustees; and

WHEREAS, the Trustees desire to amend, continue and restate this Trust Agreement and maintain the Duluth-Superior, ILA Marine Association Pension Trust to conform with the requirements of the Employee Retirement Income Security Act of 1974 and any subsequent amendments thereto and regulations promulgated pursuant to and any other federal or state law as may or become applicable.

NOW, THEREFORE, in consideration of the promises and in order to continue and provide for the maintenance of the Duluth-Superior, ILA Marine Association Pension Trust, hereinafter referred to as the "Trust", the undersigned Union Trustees and Employer Trustees declare that they will receive and hold such contributions and other money or property which may come into the Trust pursuant to the following powers and duties and for the following uses, and none other, to-wit:

ARTICLE I.

DEFINITIONS

1.1 *Act*. The term "Act" as used herein shall mean the Employee Retirement Income Security Act of 1974, any

amendments as may from time to time be made and any regulations promulgated pursuant to the provisions of the said Act.

1.2 *Administrator.* "Administrator" means the Trustees, collectively, of this Trust.

1.3 *Collective Bargaining Agreement.* Any collective bargaining agreement now or hereafter in effect, including any extensions, amendments and renewals that, pursuant to which payments are made by the Employer into the Trust.

1.4 *Employee.* Any employee with respect to whose employment payments are required to be made to the Trust by an Employer pursuant to a Collective Bargaining Agreement or pursuant to any written agreement hereinafter described. The term "Employee" also includes employees of "the Unions", and employees of the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund.

1.5 *Employer.*

a. The term "Employer" as used herein shall mean any employer (1) who has a Collective Bargaining Agreement with the Unions requiring periodic contributions to be made to the Trust and who are or become parties to this Agreement or (2) who are not parties to this Agreement but who have persons in their employ coming within the classifications represented by the Unions and have collective bargaining agreements with the Unions and who consent to be bound by the terms of this Trust

Agreement and are bound in writing to make contributions to the Trust with respect to Employees, or (3) Employers who are not parties to this Agreement and do not have a collective bargaining agreement in the Unions but who on occasion use members of the Union and who have agreed in writing to make contributions to the Trust with respect to those employees.

b. The term "Employer" also includes a Union affiliated with "the Unions", and the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund, providing any such organization shall first become contractually obligated to make similar contributions on behalf of its employees in accordance with the Trust, signs a Participation Agreement, is accepted for participation by the Trustees in accordance with the provisions of the Plan and makes contributions to the Trust as required by the Plan. Neither a Union affiliated with "the Unions", nor the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund becoming an Employer pursuant to this paragraph shall become entitled to participate in the selection or replacement of Union or Employer Trustees by virtue of being an Employer hereunder.

c. If an Employer has more than one place of business, the term "Employer" shall only apply to the place or places of business covered by the Collective Bargaining Agreement requiring contributions to the Health and Welfare Fund.

d. The term "Employer" includes the following Employers and all other subsequent employers who fall within the definition of an "Employer" as contained in this Article I., Section 1.5: Ceres Stevedoring, Inc.; American Grain Trimmers, Inc.; Guthrie Hubner, Inc.; Hanna Mining Company, Agent; S.A. McLennan; Rogers Terminal and Shipping Corporation; the Svensson Shipping Agency, Inc.; Empire Stevedoring Company, Inc.; Federal Marine Terminal, Inc.; Great Lakes Storage and Contracting Company, Inc.; and North Central Terminal Operators, Inc.; and the Duluth-Superior Marine Association General Cargo Workers, Local No. 1366 and Local No. 1037 and International Longshoremen's Association Health and Welfare Fund. Those other employers who signed the original Agreement and Declaration of Trust who are not described immediately above are no longer parties to this restated Agreement and Declaration of Trust.

1.6 *Union*. The term Union shall mean the General Cargo Workers, Local No. 1366, Duluth, Minnesota and affiliate of the International Longshoremen's Association, AFL-CIO, and General Cargo Workers, Local No. 1037, Superior Wisconsin, an affiliate of the International Longshoremen's Association, AFL-CIO.

1.7 *Trust Agreement*. The terms "Trust Agreement", "Trust" or "Restated Agreement and Declaration of Trust" as used herein shall mean this instrument, including any amendments or modifications which may from time to time be made.

1.8 *Pension Plan or Plan*. "Pension Plan or Plan" shall mean the Duluth-Superior, ILA Marine Association Restated Pension Plan, as amended.

1.9 *Administrative Manager.* The individual, firm or corporation employed by the Trustees to administer the office or offices of the Trust Fund as set forth in Article 7.6 of this Trust Agreement.

1.10 *Trustees.* Trustees are those persons selected from time to time by both the Employer and Union pursuant to section 3.2 of Article III of this Agreement to administer the Trust.

1.11 *Contract or Group Insurance Contract.* The term "Contract" or "Group Insurance Contract" as used herein means a group annuity policy issued by an insurance company which provides for the accumulation of funds and the purchase of annuities at a participant's retirement date.

ARTICLE II.
CONTRIBUTIONS

2.1 *Contributions.* Each participating Employer shall pay to the Trustees, on or before the 15th day of each month the contribution required to be made by the Employer, such contributions to be in such amount as the parties may by their collective bargaining agreement determine from time to time between them. Such date or payments may be adjusted by the Trustees as they may determine pursuant to their rules of procedure.

2.2 *New Employers.* Employers, who are not signatory to this Agreement but who have persons in their employ coming within the classifications represented by the

Unions signators hereto and who have collective bargaining agreements with such Unions, may become a participating employer under the terms of this Agreement, and make contributions to the Trust, with the consent of the Trustees, on the signing of a Participation Agreement and/or a labor agreement, where applicable, providing for participation in the Trust containing such terms as required by the Trustees and on such basis as agreed upon by such new contributing Employers and the Trustees respecting the contributions to be made and the coverages to be afforded to the employees covered.

ARTICLE III.
DESIGNATION OF TRUSTEES

3.1. *Number of Trustees.* The Trust shall be administered by a Board of Trustees, two of whom shall be chosen by the Employers and two of whom shall be chosen by the Union.

3.2 *Selection of Trustees.* The two Employer Trustees shall be selected by the Employers, and two Union Trustees shall be selected by the Unions. Both the Employers and the Unions may also select up to two (2) alternate Trustees for each group.

The term "Trustees" as used herein shall include an Alternate Trustee when he is acting in the place of a Trustee.

The Trustees shall consent to their appointment as Trustees and accept such appointment in writing.

3.3 *Identity of Trustees.* As of the effective date of this Restated Trust Agreement, the Trustees are as follows:

Employer Trustees	Union Trustees
1.	1.
2.	2.

3.4 *Tenure.* Each Trustee shall continue to serve during the existence of the Trust until his death, incapacity, resignation or removal.

3.5 *Resignation or Removal of Trustees.* A Trustee may resign at any time by giving a ten (10) day notice in writing to the remaining Trustees, which notice shall state the effective date of the resignation, when it shall take effect. In the event of the death, incapacity, removal or resignation of a Trustee, a successor Trustee shall be appointed within thirty (30) days of the effective date of the vacancy as follows: At any time for good cause, after notice and hearing with the Trustee present, a Union Trustee may be removed or appointed by a written instrument signed by the Union. Similarly, any Employer Trustee may be removed or appointed at any time by a written instrument signed by not less than three of those Employers employing a majority of the Employees covered by this Trust Agreement. In such event of party removing a Trustee shall give the other Trustees five (5) days written notice prior to the effective date of such removal of such action and shall designate in such notice the successor Trustee. The Trustees may require a special accounting before a deceased, retired, or removed Trustee is relieved of his responsibility as a Trustee.

In no event shall this Trust or the operation of the Board of Trustees be impaired by the death, incapacity, resignation or removal of a Trustee, and in the event of a vacancy on the Board of Trustees, the remaining Trustees

shall have full power to act until the designation of a successor Trustee.

As long as a vacancy exists on the Board of Trustees, or in the temporary absence of a Trustee, any alternate Trustee designated by the Employer may act in the place and stead of an absent or deceased Trustee designated by the Employer, and any alternate Trustee designated by the Union may act in the place and stead of an absent or deceased Trustee designated by the Union, and any alternate Trustee shall be vested with all the property, rights, power and duties of a Trustee.

3.6 *Successor Trustee.* In the event of the death, incapacity, removal or resignation of a Trustee, a Successor Trustee shall be appointed within thirty (30) days of the effective date of the vacancy by a written instrument signed by the chief executive officer of the Union, if a Successor Union Trustee, and by a written instrument signed by a majority of the Employers party to this Agreement or by Employers employing a majority of employees covered by this Agreement. In the event of conflicting action, action by Employers employing a majority of the covered employees shall control. Written notice of the appointment shall be served upon the other Trustees with said time.

Any Successor Trustee shall immediately upon his designation as a Successor Trustee and his acceptance thereof in writing, as provided in Section 3.7, become vested with all the property, rights, power and duties of a Trustee hereunder with like effect as if originally named a Trustee without necessity of any formal conveyance of other instrument of title. No Successor Trustee shall in

any way be liable or responsible for any act or omission in the administration of the Trust prior to the date any such Trustee becomes a Trustee.

3.7 *Acceptance of the Trust by Trustees.* A Trustee shall execute a written acceptance in a form satisfactory to the Trustees and consistent with the Act and thereby shall be deemed to have accepted the Trust created and established by this Trust Agreement and to have consented to act as Trustee and to have agreed to administer the Trust Fund as provided herein. Such written acceptance shall be filed with the Trust's Administrative Manager, who shall notify the remaining Trustees of the Receipt of such acceptance.

3.8 *Limitation of Liability of Trustees.* No Trustee shall be liable or responsible for his own acts or for any acts or defaults of any other fiduciary or party in interest or any other person except in accordance with applicable federal law. The Trustee shall not be liable for the acts or omissions of any investment manager, attorney, agent or assistant employed by them in pursuance of this Agreement, provided such investment manager, attorney, agent or assistant was selected pursuant to this Trust Agreement.

ARTICLE IV.
NAME AND PRINCIPAL OFFICE OF TRUST

4.1 The Trustees shall be known in their joint capacity as the "Trustees of the Duluth-Superior, ILA Marine Association Pension Trust.

4.2 The principal office of said Trust shall be located at 2904 West Third Street, in the City of Duluth, St. Louis

County, Minnesota 55806, unless otherwise designated by the Trustees.

ARTICLE V.
ADMINISTRATION OF TRUST FUND

5.1 *Meetings*. The Trustees shall meet at least once each fiscal year at the principal office of the Trust and at such other times at the Trustees shall deem necessary. The Chairman shall set the date, time and call the annual meeting, and, if he fails within the year to do so, the Secretary shall do so. The Chairman or Secretary or any two or more Trustees may call a special meeting of the Board of Trustees. Any annual or special meeting shall be called by giving the Trustees twenty (20) days' notice if an annual meeting or two (2) days' notice in writing if a special meeting, stating the time and place of such meeting. The attendance of a Trustee at a meeting shall constitute a waiver of notice of such meeting, except where a Trustee attends a meeting, and objects thereat to the transaction of any business because the meeting is not lawfully called or convened. Notice of substance of all matters to be acted upon at any meeting shall be contained in the notice of the meeting unless all the Trustees shall be present at the meeting. A quorum of the Trustees for the transaction of business except as otherwise provided herein shall consist of one Trustee appointed by the Union and one Trustee appointed by the Employers. It is the intention of the parties that at any time any vote or other action is taken by the Board of Trustees the number of Union Trustees and Employers Trustees qualified to act, vote and constitute a quorum shall always be equal.

5.2 *Voting*. All actions by and decisions of the Board of Trustees at a meeting at which a quorum is present shall be by the affirmative vote of a majority of the total number of the Trustees authorized. Each Trustee shall have one (1) vote. An alternate Trustee cannot vote except if acting in behalf of an absent Trustee.

5.3 *Organization and Operation of Trustees*. At the commencement of each fiscal year of the Trust, the Trustees shall select from among them a Chairman and a Secretary who shall each serve for a period of one (1) year. One officer shall be a Union Trustee and one officer shall be an Employer Trustee. The Secretary shall cause to have kept an accurate record of the proceedings at all meetings of the Trustees and of any action taken. The minutes of all meetings and a record of action take shall be transcribed and a copy retained by the Secretary as a trust record and a copy distributed to each Trustee at the cost of the Trust.

5.4 *Procedure in Event of Deadlock of Trustees*. In the event that a majority of Trustees are unable to agree upon any matter in connection with the administration of this Trust, then the Trustees shall select a neutral person as an impartial arbitrator who is willing to act in the determination of such dispute. In the event a majority of the Trustees fail to agree upon the selection of an impartial arbitrator, then any one or more of said Trustees may petition the U.S. District Court, District of Minnesota, to make the appointment of an impartial umpire to decide such dispute. The reasonable compensation of such umpire and the costs and expenses (including, without limitation, attorneys' and reporter fees) incidental to any proceedings instituted to break a deadlock shall be paid by the Trust. Proceedings hereunder shall be conducted

pursuant to Minnesota Statutes, Chapter 572. The impartial arbitrator shall have no power to alter, delete, amend, add to, take away from or disregard any of the provisions of this Agreement and Declaration of Trust. The decision of the impartial arbitrator shall be final and binding upon the Trustees, all parties hereto, the employees and their beneficiaries, and upon all persons involved in any way with the Trust or claiming any benefit thereunder.

Differences arising as to the interpretation or application of the provisions of this Trust Agreement or relating to Employee benefits provided for hereunder shall not be subject to the grievance or arbitration procedure established in any collective bargaining agreement.

5.5 *Office of the Trust.* The Trustees shall establish an office in Duluth, Minnesota, the address being 2902 West Third Street, Duluth, Minnesota 55806 for the transaction of the business of the Trust. At such office and at such other places as may be required by law there shall be maintained the books and records pertaining to the Trust and its administration.

5.6 *Removal of Trustee (Violation of Act).* The Board of Trustees shall initiate action to cause the removal of any fellow member Trustee who may be serving as a Trustee in violation of the Act. The vacancy or vacancies caused by such a removal shall be filled in accordance with Section 3.5 of this Agreement.

ARTICLE VI
POWERS AND DUTIES OF TRUSTEES

6.1 *Conduct of Trust Business.* The Trustees shall have general supervision of the operation of this Trust and

shall conduct the business and activities of the Trust in accordance with this Trust Agreement and applicable law. The Trustees shall hold, manage and protect the Trust and collect the income therefrom and contributions thereto. The Trustees may, in the course of conducting the business of the Trust, execute all instruments in the name of the Duluth-Superior, ILA Marine Association Pension Trust, which instruments shall be signed by at least one Employer and one Union Trustee; provided, however, any one Trustee may execute legal documents to commence and process lawsuits to enforce trust collections on behalf of the Trustees.

6.2 *Employers, Expert Assistance and Delegation*. The Trustees shall have the power and authority to use and apply the Trust for the following purposes:

a. To pay or provide for the payment of all reasonable and necessary expenses of collecting Employer contributions and administering the affairs of this Trust, including but not limited to, the employment of such administrative, legal, expert, investment, advisory, clerical or other assistance, the purchase or lease of such premises, materials, supplies and equipment and the performance of such other acts as the Trustees, in their sole discretion, find necessary or appropriate in the performance of their duties.

6.3 *Investments*.

a. The Trustees shall have the power and authority, in their sole discretion, to invest and reinvest such funds as are not necessary for current expenditures or liquid reserves, as they may from time to time determine, in

such investments as are legal investments under applicable state and federal law relating to the investment of the employee Trust, not limited, however, by any limitation restricting investments in common stocks to a percentage of the Trust or to a percentage of the total market value of the Trust. The Trustees may sell, exchange or otherwise dispose of such investments at any time and from time to time. The Trustees shall also have power and authority (in addition to, and not in limitation of, common law and statutory authority) to invest in any stocks, bonds or other property, real or personal, including improved or unimproved real estate and equity interests in real estate, where such an investment appears to the Trustees, in their discretion and consistent with their fiduciary obligations, to be in the best interest of the Trust and its Participants and Beneficiaries, judged by then prevailing business conditions and standards. The Trustees shall have the authority, in respect to any stocks, bonds or other property, real or personal, held by them as Trustees, to exercise all such rights, power and privileges as might be lawfully exercised by any person owning similar stocks, bonds or other property in his own right.

b. *Delegation and Allocation of Investment Functions.*

(1) The Trustees are authorized, in their discretion, by resolution, to allocate to a committee of Trustees such duties and responsibilities to invest and reinvest such Trust assets as they shall specify in such allocation.

(2) The Trustees shall have the power and authority to appoint one or more investment managers (as defined in Section 3(38) of the Act) who shall be responsible for the management, acquisition, disposition,

investing and reinvesting of such of the assets of the Trust as the Trustees shall specify. Any such appointment may be terminated by the Trustees upon thirty (30) days' written notice. The fees of such investment manager, and its expenses to the extent permitted by law, shall be paid out of the Trust.

(3) In connection with any allocation or delegation of investment functions under paragraphs (1) and (2) of this Subsection b, the Trustees shall, from time to time, adopt appropriate investment policies or guidelines.

6.4 *Deposits and Disbursements.* All Trust funds not invested shall be deposited by the Trustees in such depository or depositories as the Trustees shall from time to time select, and any such deposit or deposits, or disbursements therefrom, shall be made in the name of the Trust in the manner designated by the Trustees and upon the signature(s) of the persons designated and authorized by the Trustees or by the Investment Manager appointed in accordance with Section 3b(2) of this Article.

6.5 *Allocation and Delegation of Fiduciary Responsibilities.* The Trustees may, by resolution or bylaw or by provisions of this Trust Agreement, allocate fiduciary responsibilities and various administrative duties to committees or subcommittees of the Board of Trustees, and they may delegate such responsibilities and duties to other individuals, as they may deem appropriate or necessary in their sole discretion and consistent with the Act. The Trustees shall not be deemed responsible for any errors or omissions of persons to whom such responsibilities or duties have been properly allocated or delegated.

6.6 *Administrative Manager.* The Trustees may employ or contract for the services of an individual, firm or corporation, to be known as "Administrative Manager", who shall, under the direction of the Trustees or under the direction of any appropriate committee of the Trustees, administer the office or offices of the Trust and of the Trustees, coordinate and administer the accounting, bookkeeping, and clerical services, provide for the coordination of actuarial services furnished by the consulting actuary, prepare (in cooperation where appropriate with the consulting actuary, and independent auditor) all reports and other documents to be prepared, filed or disseminated by or on behalf of the Trust in accordance with law, assist in the collection of contributions required to be paid to the Trust by Employers and perform such other duties and furnish such other services as may be assigned, delegated or directed or as may be contracted by or on behalf of the Trustees. The Administrative Manager shall be the custodian on behalf of the Trustees of all documents and other records of the Trustees and of the Trust.

6.7 *Bylaws, Rules and Regulations.*

a. The Trustees are hereby empowered and authorized to adopt bylaws and to promulgate any and all necessary rules and regulations which they deem necessary or desirable to facilitate the proper administration of the Trust, provided the same are not inconsistent with the terms of this Trust Agreements. All bylaws, rules and regulations adopted by action of the Trustees shall be binding upon all parties hereto, all parties dealing with the Trust and all persons claiming and benefits hereunder.

b. The Trustees shall, by the affirmative vote of at least two (2) Employer Trustee votes and two (2) Union Trustee votes, adopt the Plan and bylaws, rules or regulations in respect to the Plan or eligibility of Participants and Beneficiaries for the benefits herein provided, which Plan, bylaws, rules or regulations may, by the above-specified vote, be changed and modified from time to time in such manner and to such extent as the Trustees may deem expedient and necessary in the proper administration of the Trust.

c. No bylaw, regulation, rule, action or determination made or adopted by the Trustees, nor any decision or determination made by any impartial umpire appointed pursuant to Section 6.4 of this Agreement, shall in any manner conflict or be inconsistent (1) with any provision of the applicable current collective bargaining agreement in effect or, which may be made, between the Employers and the Union, (2) with this Trust Agreement, and (3) with any applicable federal, state or local law.

6.8 *Additional Authority*. The Trustees are hereby empowered, in addition to such other powers as are set forth herein or conferred by law:

a. To enter into any and all contracts and agreements for carrying out the terms of this Trust Agreement and for the administration of the Trust and to do all acts as they, in their discretion, may deem necessary or advisable, and such contracts and agreements and acts shall be binding and conclusive on the parties hereto and on the Participants involved, except as may be limited by law;

b. To keep property and securities registered in the names of the Trustees or of the Trust or in the name of

any other individual or entity nominee or nominees duly designated by the Trustees with disclosure of any fiduciary relationship;

c. To establish and accumulate as part of the Trust such reasonable reserve funds as the Trustees, in their sole discretion, deem necessary or desirable to carry out the purposes of such Trust;

d. To pay out of the Trust all real and personal property taxes, income taxes and other taxes of any and all kinds levied or assessed under existing, or future laws or upon or in respect to the Trust or any money, property or securities forming a part thereof;

e. To do all acts, whether or not expressly authorized herein, which the Trustees may deem necessary or proper for the protection of the property held hereunder;

f. To sell, exchange, lease, convey, mortgage or dispose of any property, whether real or personal, at any time forming a part of the Trust upon such terms as they may deem proper and to execute and deliver any and all instruments of conveyance, lease, mortgage and transfer in connection therewith; and

g. To establish and carry out a funding policy and method consistent with the objectives of this Trust Agreement and the Act.

6.9 *Bonds*. The Trustees shall obtain from an authorized surety company such bonds as may be required by law, covering such persons and in such amounts (but not less than required by law) as the Trustees, in their discretion, may determine. [The cost of premiums for such bonds shall be an expense of the Trust.]

6.10 *Insurance.* The Trustees may, in their discretion, obtain and maintain policies of insurance, to the extent permitted by law, to insure themselves, the Trust as such, as well as employees or agents of the Trustees and of the Trust, while engaged in business and related activities for and on behalf of the Trust (1) with respect to liability to others as a result of acts, errors or omissions of such Trustee or Trustees, employees or agents, respectively, provided such insurance policy shall provide recourse by the insurer against Trustees as may be required by law, and (2) with respect to injuries received or property damage suffered by them. The cost of the premiums for such policies of insurance except for recourse insurance shall be an expense of the Trust.

6.11 *Information to Participants and Beneficiaries.* The Trustees will provide Participants and Beneficiaries such information as may be required by law.

6.12 *Accountants and Actuaries.* The Trustees shall engage one or more independent qualified public accountants and one or more enrolled actuaries to perform all services as may be required by applicable law and such other services as the Trustees may deem necessary.

6.13 *Compensation.* The Trustees and their successors shall receive reasonable compensation for services rendered, and shall be reimbursed for expenses properly and actually incurred in the performance of their duties with the plan; provided, however, that no Trustee who receives full-time pay from an employer or an association of employers, whose employees are participants in the Trust, or from an employee organization whose members are participants in such Trust shall receive compensation

from such Trust, except for reimbursement of expenses properly and actually incurred.

6.14 *Reports.* All reports required by law to be signed by one or more Trustees shall be signed by all of the Trustees, provided that all of the Trustees may appoint, in writing and by resolution adopted and spread on the minutes, one or more of their members to sign such report on behalf of the Trustees.

6.15 *Records of Trustee Transactions.* The Trustees shall keep true and accurate books of account and a record of all of their transactions and meetings (including actions taken at such meetings and by informal action of the Trustees), which records and books shall be audited at least annually by a certified public accountant. A copy of each audit report shall be furnished both to the Trustees and shall be available for inspection by interested persons at the principal office of the Trustees.

6.16 *Construction and Determinations by Trustees.* Subject to the stated purposes of the Trust and the provisions of this Agreement, the Trustees shall have full and exclusive authority to determine all questions of eligibility, amount of benefits payable under the Pension Trust, methods of providing or arranging for benefits and all other related matters. They shall have full power to construe the provisions of this Agreement, the terms used herein, and the Pension Trust, bylaws and regulations issued hereunder. Any such determination and any such construction adopted by the Trustees in good faith shall be binding upon all of the parties hereto and the employees, Participants and Beneficiaries hereof to the

extent permitted by law. No matter respecting the foregoing or any difference arising thereunder or any matter involved in or arising under this Trust Agreement shall be subject to the grievance or arbitration procedure established in any collective bargaining agreement between the Employer and the Union, provided, however, that this clause shall not affect the rights and liabilities of any of the parties under any of such collective bargaining agreements.

6.17 *Liability.*

a. Every act done, power exercised or obligation assumed by the Trustees pursuant to the provisions of this Agreement or in carrying out this Trust shall be done, exercised or assumed, as the case may be, by the Trustees in their capacity as Trustees and not otherwise, and every person, corporation, partnership, association or firm contracting or otherwise dealing with the Trustees shall look only to the Trust for payment under such contract or any obligation arising under this Agreement, in whole or in part.

b. Except as provided by law, no Trustee shall be liable for any act, ommission or failure to act or for any mistake of fact or law or error of judgment or for loss or depreciation in the value of the Trust occurring by reason thereof, nor shall any Trustee be liable for the acts or defaults of any other Trustee under this Trust Agreement or for any acts or defaults of any officer, agent, attorney or employee in whose appointment the Trustee shall have exercised reasonable care and diligence.

6.18 *Reliance on Written Instruments.* Each of the Trustees shall be protected in acting upon any paper or

document believed by him to be genuine and to have been made, executed or delivered by the proper parties purporting to have made, executed or delivered the same and shall be protected in relying and acting upon the opinion of legal counsel in connection with any matter pertaining to the administration or execution of the Plan. The Trustees may rely upon an instrument in writing purporting to have been signed by, or upon telegrams purporting to have been transmitted by, any Trustee, Employer or the Unions as conclusive evidence of the fact that the said Trustee, Employer or the Unions have duly taken the action stated to have been taken in such instrument or telegram.

6.19 *Reliance by Others.* No party dealing with the Trustees shall be obligated (1) to see to the application to the stated Trust purposes of any funds or property of the Trust or (2) to see that the terms of this Trust Agreement have been complied with or (3) to inquire into the necessity or expediency of any act of the Trustees. Every instrument executed by the Trustees shall be conclusive evidence in favor of every person relying thereon (1) that at the time of the execution of said instrument the Trust was in full force and effect, (2) that the instrument was executed in accordance with the terms and conditions of this Trust Agreement, and (3) that the Trustees were duly authorized and empowered to execute the instrument.

6.20 *Discharge of Liability.* The receipt of the Trustees for any money or property or checks (after such checks are honored at the bank and paid to the Trust) shall discharge the person or persons paying or transferring the same.

6.21 *Multiple Benefit Schedules*. The Trustees shall be authorized to accept contributions at more than one rate and they shall provide in the Pension Trust for levels of benefits appropriate for each such rate of contribution. However, it is the intention of the parties hereto that contributing Employers hereto shall, to the extent feasible, negotiate identical contribution rates.

ARTICLE VII.
CONTRIBUTIONS AND COLLECTIONS

7.1 *Employer Contributions*. Each Employer shall make prompt contributions or payments to the Trust in such amount and under the terms as are provided for in the applicable collective bargaining agreement in effect from time to time between the Employer may also be required to make contributions in such amount and under such terms as such Employer may be obligated, in writing, to make, provided that such contributions shall be subject to acceptance by the Trustees. The employer agrees that such contributions shall constitute an absolute obligation to the Trust, and such obligation shall not be subject to set-off or counterclaim which the Employer may have for any liability of the Union or of an Employee.

7.2 *Transmission of Reports and Contributions*. The Trustees shall establish a uniform system among the Employers for the timely transmission of reports and contributions and shall also establish a periodic date on which such reports and contributions shall be due. The Trustees shall immediately notify any Employer of a delinquency, mistake or discrepancy in such Employer's

report or contribution. The Trustees may at any time have an audit made by an accountant or any representative or employee of the Trust of the payroll and wage records of any Employer in connection with the said contributions and/or reports.

7.3 *Trustees Sanctions.*

a. Collection and Enforcement of Payments. The Trustees, or such committee of the Trustees as the Board of Trustees shall appoint, or the Administrative Manager if one has been appointed and when directed by such committee or by the Board of Trustees, shall have the power to demand, collect and receive Employer payments and all other money and property to which the Trustees may be entitled and shall hold the same until applied to the purposes provided in this Trust Agreement. They shall take such steps, including the institution and prosecution of, or the intervention in, such legal or administrative proceedings as the Trustees, in their sole discretion, determine to be in the best interest of the Trust for the purpose of collecting such payments, money and property, without prejudice, however, to the rights of the Union to take whatever steps it deems necessary and wishes to undertake for such purposes.

b. Contributions to the Trust shall be due and payable fifteen (15) days following the end of the preceding month. The failure of an Employer to pay all amounts due within thirty (30) days following the due date, whether willful or otherwise, shall subject the delinquent Employer to a payment of liquidated damages of an additional ten percent (10%) of the amount due plus all

costs and reasonable attorneys' fees incurred in connection therewith. Payments and liquidated damages unpaid by the first day of the following month shall be subject to an interest charge of eight percent (8%) per annum on the payments and liquidated damages.

If legal action is taken to recover the amount due the Trust, the delinquent Employer shall also be required to pay all court costs, including reasonable attorneys' fees. In addition to the other provisions as herein set forth, any Employer who is delinquent in his payment to the Trust shall make such Employer primarily liable and responsible to its employees or employees' estates for any claim for benefits accruing to such employees or employees' estates which would otherwise be due such employees or employees' estates under the administration of this Trust. The payment of any and all such claims shall not operate to relieve such Employer from his liability to make the payments due the Trust, including the liquidated damage payment.

Any Employer who on more than one occasion during any one year becomes delinquent in its payment to the Trust shall be required to post a bond with the Trustees in an amount equivalent to the total contributions which it was obligated to make during the preceding calendar year.

Nonpayment by any Employer of any contribution or other monies owed to the Trust shall not relieve any other Employer from his or its obligation to make required payments to the Trust.

c. Each Employer shall promptly furnish to the Trustees, on demand, the names of employees, their

social security numbers, the hours worked by each employee and such other information as the Trustees may reasonably require in connection with the administration of the Trust and for no other purposes. The Trustees may by their Administrative Manager or Certified Public Accountant examine the pertinent employment and payroll records of each Employer at the Employer's place of business whenever such examination is deemed necessary or advisable by majority vote of the Trustees in connection with the proper administration of the Trust. The Union shall, upon the request of the Trustees, promptly furnish information in respect to an employee's employment status.

ARTICLE VIII.
BENEFICIAL RIGHTS

8.1 *No Rights, Title or Interest of Employers and Union.* No Employer or Union shall have any right, title or interest in or to the Trust or any part thereof except that, upon either the written request of the Employer or Union, the Trustees shall return to the Employer or Union the amount of the Employer's or Union's contribution made by the Employer or Union by good faith mistake of fact or the amount of the Employer's or Union's contribution disallowed as a deduction under Code Section 404.

The Trustees shall not return any portion of the Employer's or Union's contribution made pursuant to Article II more than one (1) year after:

(a) The Employer or the Union made the contribution by good faith mistake of fact; or

(b) The disallowance of the contribution as a deduction, and then, only to the extent of the disallowance.

Except as herein before provided, no Employer shall directly or indirectly, receive any refund on contributions made by it to the Trust, or directly or indirectly participate in the disposition of the Trustor receive any benefits from the Trust. No employee shall have any individual right, title, interest, or claim against any Employer, Employer's contribution, or the Trust, except as may be expressly provided for in the Plan and in this Agreement and Declaration of Trust.

8.2 *Limitations Upon Beneficial Rights of Employees.* No employee, Participant, or any Beneficiary of a Participant shall have any right, title or interest in or to the Trust or any part thereof, provided, however, that any Participant who shall be covered by the Plan, or his Beneficiaries under such Plan, shall be entitled to the benefits in the forms and amounts and subject to the terms and conditions of this Trust; provided, further, however, the benefits shall be free from the interference and control of any creditor, and no benefits shall be subject to any assignment or other anticipation or subject to seizure or sale under any legal, equitable or any other process, and, in the event that any claim or, benefit shall, because of any debt incurred by or resulting from any other claim or liability against any Participant or Beneficiary, by reason of any sale, assignment, transfer, encumbrance, anticipation or other disposition made or attempted by said Participant or Beneficiary, or by reason of any seizure or sale or attempted sale under any legal, equitable or other process, or in any suit or proceeding, become payable, or be liable to become payable, to any

person other than the Participant or Beneficiary for whom the same is intended, as provided herein and in the Trust.

ARTICLE IX.
TERMINATION OF TRUST

9.1 *Conditions of Termination.* This Trust Agreement shall cease and terminate upon the happening of any one or more of the following events:

a. In the event the Trust shall, in the opinion of the Trustees, be inadequate to carry out the intent and purpose of this Trust Agreement or be inadequate to meet the payments due or to become due under this Trust Agreement and under the plan of benefits to Participants and Beneficiaries already drawing benefits;

b. In the event there are no individuals living who can qualify as employees hereunder;

c. In the event of termination by action of the Union and the Employers;

d. In the event of termination as may be otherwise provided by law.

9.2 *Procedures in Event of Termination.* In the event of termination, the Trustees shall:

a. Make provisions out of the Trust for the payment of expenses incurred up to the date of termination of the Trust and the expenses incidental to such termination;

b. Arrange for a final audit and report of their transactions and accounts for the purpose of termination of their Trusteeship;

c. Apply the Trust to pay any and all (or provide for the payment of) benefits accrued prior to the date of termination in the manner and order of preference set forth in provisions of the Plan then in effect;

d. Give any notices and prepare and file any reports which may be required by law.

ARTICLE X.
MISCELLANEOUS

10.1 *Law Applicable.* This Trust is created and accepted in the State of Minnesota, and all questions pertaining to the validity or construction of this Trust Agreement and of the acts and transactions of the parties hereto shall be determined in accordance with the laws of the State of Minnesota, except as to matters governed by federal law.

10.2 *Refund of Contributions.* In no event shall any Employer, directly or indirectly, receive any refund on contributions made by them to the Trust (except to the extent permitted by law), nor shall an Employer directly or indirectly participate in the disposition of the Trust. Upon payment of contributions to the Trustees, all responsibilities of the Employer for each contribution shall cease, and the Employer shall have no responsibilities for the acts of the Trustees, nor shall an employer be obliged to see to the application of any funds or property of the Trust or to see that the terms of the Trust have been complied with.

10.3 *Judicial Settlements and Action by Trustees.* The Trustees shall be entitled, at any time, to have a judicial

settlement of their accounts and to seek judicial protection by any action or proceeding they determine necessary and, further, to obtain a judicial determination or declaratory judgment as to any question or construction of this Trust Agreement or for instructions as to any action thereunder and, further, as to any questions relating to the discharge of their duties and obligations under, or in connection with the administration of this Trust and as to the distribution of assets belonging to the Trust. Any such determination, decision or judgment shall be binding upon all parties to, or claiming under, this Trust Agreement.

10.4 *Withholding Payment.* In the event any question or dispute shall arise as to the proper person or persons to whom any payments shall be made hereunder, the Trustees may withhold such payment until there shall have been made an adjudication of such question or dispute which, in the Trustees' sole judgment, is satisfactory to them or until the Trustees shall have been fully protected against loss by means of such indemnification agreement or bond as they, in their sole judgment, determine to be adequate.

10.5 *Gender.* Whenever any words are used in this Trust Agreement in the masculine gender, they shall also be construed to include the feminine or neuter gender in all situations where they would so apply; whenever any words are used in the singular, they shall also be construed to include the plural in all situations where they would so apply, and wherever any words are used in the plural they shall also be construed to include the singular.

10.6 *Amendment of Trust Agreement.*

a. The provisions of this Trust Agreement may be amended at any time by either of the following methods:

1. An amendment may be proposed by any Trustee or any signatory in this Agreement. A majority of the Trustees voting in accordance with the provisions of Section 6.2 shall first concur in the amendment and thereafter shall submit the same in writing to the Union and the Employers signatory to the original Trust Agreement. Within thirty (30) days after the date of mailing of said amendment, the Union or such Employers signatories may present in writing to the Trustees objections thereto. The amendment shall not become effective if (a) the Union objects to the amendment, or (b) a majority of such Employers signatories hereto or of such Employers employing a majority of the employees covered by this Trust Agreement object to the amendment. If no objections are made, or if the objections are insufficient in number pursuant to the provisions of this Section, then the amendment shall become effective as of the effective date set forth therein.

2. An amendment may be proposed by any Trustee and may be adopted by the unanimous vote of the Full Board of Trustees.

b. No amendment shall be adopted which alters the basic purpose of this Trust Agreement or of the Plan; conflicts with any applicable law or government regulation; causes the use or diversion of any part of the Trust for purposes other than those authorized herein; or so amend this Trust Agreement that there shall not be an equal number of Employer Trustee votes and of Union

Trustee votes in the administration of the Trust. An amendment may have retroactive effect, if deemed necessary by the Trustees.

10.7 *Article and Section Titles.* The Article and Section titles are included solely for convenience and shall in no event be construed to affect or modify any part of the provisions of this Trust Agreement or be construed as part thereof.

10.8 *Counterparts.* This Trust Agreement may be executed in any number of counterparts, each of which shall be deemed an original, but all of which shall constitute one and the same agreement.

IN WITNESS WHEREOF, the Union Trustees and Employer Trustees have caused this Restated Agreement and Declaration of Trust to be executed this 13th day of December, 1979.

In the presence of:

/s/ Illegible

/s/ Fred Beatty

/s/ Illegible

/s/ Fred Beatty

CESES TERMINAL, INC.

BY /s/ Illegible

AMERICAN GRAIN TRIMMERS, INC.

BY /s/ Illegible

EMPLOYER TRUSTEES:

/s/ Illegible

/s/ Illegible

UNION TRUSTEES:

/s/ Illegible

GUTHRIE-HUNTER, INC.

BY /s/ Illegible

HANNA MINING COMPANY, ASSOC.

BY /s/ Illegible

S. A. MCLKHWAN

BY /s/ Illegible

ROCKES TERMINAL & SHIPPING CORPORATION

BY /s/ Illegible

THE SVENSON SHIPPING AGENCY

BY /s/ Illegible

EMPIRE STEVEDORING COMPANY, INC.

BY /s/ Illegible

FEDERAL MARINE TERMINALS, INC.

BY /s/ Illegible

GREAT LAKES STORAGE & CONTRACTING COMPANY, INC.

BY /s/ Illegible

NORTH CENTRAL TERMINAL OPERATIONS, INC.

BY /s/ Illegible

GENERAL CARGO WORKERS, LOCAL NO. 1366

BY /s/ Illegible

GENERAL CARGO WORKERS, LOCAL NO. 1037

BY /s/ Illegible

GREAT LAKES ASSOCIATES, INC.

BY /s/ Illegible